IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

MELVIN PUSEY, Plaintiff, v. GLORIA J. GREEN, JOSEPH H. BELANGER, LT. DUAN, JAMES GARDELS, C/O HOLCOMB, C/O FETIZ, SGT POWELL, LAWRENCE MCGUIGAN, CHARLES CUNNINGHAM, MICHAEL WELCOME, TODD KRAMER, LT. FETZER, and ANTHONY RENDINA, Defendants.	)	Civil Action No. 02-351-SLR

MEMORANDUM ORDER

Plaintiff Melvin Pusey, SBI #141523, a pro se litigant, is presently incarcerated at the Delaware Correctional Center ("DCC") located in Smyrna, Delaware. Plaintiff filed this action pursuant to 42 U.S.C. § 1983.

I. STANDARD OF REVIEW

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331. On May 9, 2002, plaintiff filed the complaint and paid the $150.00 filing fee. Although plaintiff has paid the filing fee in full, the court must "screen" the complaint pursuant to 28 U.S.C. § 1915A. See Shane v. Fauver, 213 F.3d 113, 116, n.2 (3d Cir. 2000)(recognizing district court's authority to "screen" prisoner complaint pursuant to §

1915A(b)(1) even if prisoner is not proceeding in forma pauperis). Section 1915A requires the court to screen prisoner complaints seeking redress from governmental entities, officers or employees before docketing, if feasible, and to dismiss those complaints which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant immune from such relief. See 28 U.S.C. § 1915A(a)(b)(1). If the court finds plaintiff's complaint falls under any one of the exclusions listed in the statute, then the court must dismiss the complaint.

When reviewing complaints pursuant to 28 U.S.C. § 1915A(b)(1), the court must apply the Fed. R. Civ. P. 12(b)(6) standard of review. See Neal v. Pennsylvania Bd. of Probation and Parole, No. 96-7923, 1997 WL 338838 (E.D. Pa. June 19, 1997)(applying Rule 12(b)(6) standard as appropriate standard for dismissing claim under § 1915A). Accordingly, the court must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996). Pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Estelle v. Gamble, 429 U.S. 97, 106 (1976)(quoting

Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

The standard for determining whether an action is frivolous is well established. The Supreme Court has explained that a complaint is frivolous "where it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989).[1] As discussed below, plaintiff's First and Fourteenth Amendment claims have no arguable basis in law or in fact, and shall be dismissed as frivolous pursuant to 28 U.S.C. § 1915A(b)(1). However, plaintiff's Eighth Amendment claims are not frivolous within the meaning of 28 U.S.C. § 1915A(b)(1).

II. DISCUSSION

A. The Amendments

On May 28, 2002, plaintiff filed a "Motion to Amend the Complaint" (D.I. 7) along with a "Supplemental Amended Complaint." (D.I. 6) The court construes the "Supplemental Amended Complaint" as an amended complaint pursuant to Fed. R. Civ. P. 15(a) and shall deny the motion to amend the complaint (D.I. 7) as moot. On June 12, 2002, plaintiff filed a "Motion for Leave to File an Amended First Complaint." (D.I. 8) "After amending once or after an answer has been filed, the plaintiff

[1] Neitzke applied § 1915(d) prior to the enactment of the Prisoner Litigation Reform Act of 1995 (PLRA). Section 1915A contains the same language as § 1915 (e)(2)(B), which is the re-designation of the former § 1915(d) under the PLRA. Therefore, cases addressing the meaning of frivolousness under the prior section remain applicable. See § 804 of the PLRA, Pub.L.No. 14-134, 110 Stat. 1321 (April 26, 1996).

may amend only with leave of the court or the written consent of the opposing party, but 'leave shall be freely given when justice so requires.'" Shane v. Fauver, 213 F.3d 113, 115 (3d Cir. 2000) (quoting Fed. R. Civ. P. 15(a)). Therefore, the court shall grant plaintiff's motion (D.I. 8) and shall consider the allegations contained in the motion when making its decision in this matter.

B. The Complaint

Plaintiff raises First, Eighth and Fourteenth Amendment claims in his complaint. Plaintiff raises three separate Eighth Amendment claims against defendants Gardels, Duan, Holcomb, Fetiz, Powell, Belanger, McGuigan, Cunningham, and Welcome. (D.I. 2 at 5-10) First, plaintiff alleges that on October 16, 2001, defendants Gardels, Duan, Holcomb, and Fetiz used excessive force against him after he argued with them regarding whether his sanction period had ended. (Id.) Specifically, plaintiff alleges that he was escorted to his cell by defendants Gardels, Duan, Holcomb, and Fetiz and that as he was entering his cell, defendant Duan "roughly pushed the plaintiff inside." (Id. at 5) Plaintiff further alleges that he "fell into the cell" and his left leg became caught in the door as "some other officer" was closing it. (Id. at 6) Plaintiff alleges that he tried to open the door to pull his foot free and that defendant Duan sprayed him with mace. (Id.) Plaintiff further alleges that defendant

Gardels "grabbed the plaintiff by his hair and slammed his face into concrete several times causing injuries to the mouth and cheekbone to the extent of needing medical attention." (Id.) Plaintiff also alleges that one of the other defendants was kicking him in the ribs. (Id.)

Second, plaintiff alleges defendants Powell, Belanger, McGuigan, and Cunningham denied him appropriate medical treatment. (Id. at 6-10) Specifically, plaintiff alleges that defendant Powell ignored his request to be taken to the nurse, as defendant Powell was moving plaintiff to the "strip cell" area. (Id. at 7) Plaintiff further alleges that defendants Belanger, McGuigan, and Cunningham also ignored his request to see a nurse. (Id. at 8)

Third, plaintiff alleges that defendants Belanger, McGuigan, Cunningham, and Welcome have violated his Eighth Amendment right to be free from cruel and unusual punishment by placing him in an unsanitary "strip cell" without adequate bedding or clothing. (Id. at 8-10) Specifically, plaintiff alleges that the cell he was placed in had "feces on the door and the window and in other locations with a stench that was unbearable." (Id. at 8) Plaintiff further alleges that he was confined in the "strip cell" for 8 days without a mattress, sheets, blanket, toilet paper, soap, toothpaste, toothbrush or medical attention. (Id. at 9) Plaintiff alleges that he was moved to another strip cell

October 24, 2001 and was given a jumper but not shoes or socks. (Id. at 10).

Plaintiff raises two separate Fourteenth Amendment claims concerning his classification and subsequent adjustment hearing and appeal. (Id. at 10-17) First, plaintiff alleges that on November 13, 2001, defendant Kramer moved him to the Security Housing Unit ("SHU") and downgraded him from quality of life level 5 to level 1, without notice or a hearing. (Id. at 10) Second, plaintiff alleges that on March 21, 2002, defendant Green convened an adjustment hearing regarding two sets of charges for disorderly or threatening behavior and failure to obey an order. (Id. at 16) Plaintiff alleges that the charges stemmed from the October 16, 2001 incident and from another incident on January 20, 2002. (Id.) Plaintiff further alleges that he didn't know anything about the January 20, 2002 charges and that he requested a delay of the hearing. Plaintiff alleges that defendant Green not only denied his request, she found plaintiff guilty of all charges and terminated the proceedings. (Id. at 17) Third, plaintiff alleges that defendant Rendina also violated his Fourteenth Amendment rights by denying his appeal regarding the adjustment hearing. (D.I. 6 at 1) Plaintiff further alleges that defendant Rendina failed to investigate his claims that defendant Green wrongfully terminated his adjustment hearing. (Id.)

Finally, plaintiff alleges that defendants Belanger and Fetzer have violated his First Amendment rights by retaliating against him. (D.I. 2 at 12) Specifically, plaintiff alleges on January 30, 2002, defendants Belanger and Fetzer terminated plaintiff's visit with a female visitor and suspended her visiting privileges for 90 days. (Id. at 13-14) Plaintiff further alleges that he filed a grievance regarding this matter on February 11, 2002. (Id.)

Plaintiff requests that the court award him unspecified compensatory and punitive damages, as well as "such other relief as may be just and proper." (Id. at 19)

C. The Motion for Appointment of Counsel

Also pending before the court is plaintiff's motion for appointment of counsel. (D.I. 4) Plaintiff asserts that the issues in this case are complex and that he lacks both the skills and the ability necessary to effectively prosecute his claims. He also contends that he needs the assistance of counsel because he is allowed only limited access to the prison law library and that a credibility issue may arise. (Id.)

A plaintiff has no constitutional or statutory right to the appointment of counsel in a civil case. See Parham v. Johnson, 126 F.3d 454, 456-57 (3d Cir. 1997); Tabron v. Grace, 6 F.3d 147, 153-54 (3d Cir. 1993). Under certain circumstances, the court may in its discretion appoint an attorney to represent an

indigent civil litigant. See 28 U.S.C. § 1915(e)(1). However, in Tabron and again in Parham, the Third Circuit Court of Appeals articulated the standard for evaluating a motion for appointment of counsel filed by a pro se plaintiff.

Initially, the court must examine the merits of a plaintiff's claim to determine whether it has some arguable merit in fact and law. See Parham, 126 F.3d at 457 (citing Tabron, 6 F.3d at 157); accord Maclin v. Freake, 650 F.2d 885, 887 (7th Cir. 1981)(per curiam)(cited with approval in Parham and Tabron). Only if the court is satisfied that the claim is factually and legally meritorious, should it then examine the following factors: (1) the plaintiff's ability to present his own case; (3) the complexity of the legal issues; (3) the extensiveness of the factual investigation necessary to effectively litigate the case and the plaintiff's ability to pursue such an investigation; (4) the degree to which the case may turn on credibility determinations; (5) whether the testimony of expert witnesses will be necessary; and (6) whether the plaintiff can attain and afford counsel on his own behalf. See Parham, 126 F.3d at 457-58 (citing Tabron, 6 F.3d at 155-56, 157 n.5). This list, of course, is illustrative and by no means exhaustive. See id. at 458. Nevertheless, it provides a sufficient foundation for the court's decision.

While the court believes that plaintiff's Eighth Amendment

claims are not frivolous within the meaning of 28 U.S.C. § 1915A(b)(1), the court does not believe that plaintiff meets the remaining Parham and Tabron factors. First, although plaintiff has restricted use of the law library, as well as a limited ability to conduct a thorough investigation into the law of his case, he has presented his case in a clear and concise manner. It appears from the allegations and the record before the court that he does not need assistance gathering facts to support his claims. Additionally, the court finds that the issues, as currently presented, are not legally or factually complex. It is unclear at this point whether the case may turn on credibility determinations or on the testimony of expert witnesses. Therefore, the court declines to appoint counsel at this stage in the litigation.

D. The Motions for Class Certification and Default Judgment

At the time he filed the complaint, plaintiff also filed a motion for class certification (D.I. 2). A class action can only be maintained if the class representative "will fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(a)(4). "When confronting such a request from a prisoner, courts have consistently held that a prisoner acting pro se 'is inadequate to represent the interests of his fellow inmates in a class action.'" Maldonado v. Terhune, 28 F.Supp.2d 284, 299 (D.

N.J. 1998) (citing Caputo v. Fauver, 800 F.Supp. 168, 170 (D. N.J. 1992)). Accordingly, plaintiff may not maintain this suit as a class action and the motion shall be denied.

On September 3, 2002, plaintiff also filed a motion for default judgment. (D.I. 14) As this prisoner case is subject to screening under 28 U.S.C. § 1915A(b)(1), the court has not yet directed the United States Marshal to serve the complaint on the defendants. Consequently, there is no basis to grant plaintiff's motion. See Fed. R. Civ. P. 4. Therefore, plaintiff's motion or default judgment shall be denied.

E. Analysis

1. Plaintiff's Fourteenth Amendment Claims

Plaintiff alleges that defendant Kramer violated his Fourteenth Amendment right to due process by reclassifying him to the SHU without notice and a hearing. He also alleges that defendants Green and Rendina violated his due process rights during his adjustment hearing and subsequent appeal. Analysis of plaintiff's due process claims begins with determining whether a constitutionally protected liberty interest exists. See Sandin v. Connor, 515 U.S. 472 (1995); Hewitt v. Helms, 459 U.S. 460 (1983). "Liberty interests protected by the Fourteenth Amendment may arise from two sources -- the Due Process Clause itself and the laws of the States." Hewitt v. Helms, 459 U.S. at 466.

The Supreme Court has explained that liberty interests

protected by the Due Process Clause are limited to "freedom from restraint" which imposes an "atypical and significant hardship in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. at 483-84. Reclassification to a stricter housing unit and its consequent loss of privileges "falls within the expected parameters of the sentence imposed by a court of law." Id. at 485. Furthermore, the type of sanction plaintiff received, "by itself, is not sufficient to create a liberty interest, and [plaintiff] does not claim that another constitutional right (such as access to the courts) was violated." Smith v. Mensinger, 293 F.3d 641, 653 (3d Cir. 2002). Therefore, the court concludes that plaintiff's classification to the SHU was "within the normal limits or range of custody [his] conviction authorizes the State to impose." Meachum v. Fano, 427 U.S. 215, 225 (1976).

Furthermore, this court has repeatedly determined that the Department of Correction statutes and regulations do not provide prisoners with liberty or property interests protected by the Due Process Clause. See Carrigan v. State of Delaware, 957 F. Supp. 1376 (D. Del. 1997); Jackson v. Brewington-Carr, No. 97-270, 1999 U.S. Dist. LEXIS 535 (D. Del. Jan. 15, 1999). Defendant Green's handling of plaintiff's adjustment hearing and defendant Rendina's handling of his appeal were "within the normal limits or range of custody [his] conviction authorizes the State to

impose." Meachum v. Fano, 427 U.S. at 225. Consequently, plaintiff's claims that the defendants have violated his Fourteenth Amendment right to due process have no arguable basis in law or in fact. Therefore, the court shall dismiss these claims as frivolous pursuant to 28 U.S.C. § 1915A(b)(1).

2. Plaintiff's First Amendment Claim

Plaintiff alleges that defendants Belanger and Fetzer retaliated against him by terminating his visit on January 30, 2002 and suspending his visitor's visitation privileges for 90 days. A prisoner may bring an action for retaliation, when the alleged retaliation is the result of the prisoner's First Amendment activity, such as filing a grievance or a lawsuit. See, Dixon v. Brown, 38 F.3d 379 (8th Cir. 1994); Spouse v. Babcock, 870 F.2d 450, 452 (8th Cir. 1989); Franco v. Kelly, 854 F.2d 584, 589-90 (2d Cir. 1988). Here, plaintiff alleges that he filed a grievance after defendants Belanger and Fetzer suspended his visitor's visitation privileges for 90 days. Clearly, plaintiff's First Amendment claim against defendant Belanger has no arguable basis in law or in fact. Therefore, the court shall dismiss this claim as frivolous pursuant to 28 U.S.C. § 1915A(b)(1).

3. Plaintiff's Eighth Amendment Claims

Plaintiff alleges that defendants, Holcomb, Fetiz, Belanger, Duan, Gardels, Powell, McGuigan, Cunningham, and Welcome have

violated his constitutional right to be free from cruel and unusual punishment by using excessive force against him, denying him medical treatment and confining him to a feces covered cell for eight days without adequate clothes, bedding or cleaning supplies. (D.I. 2 at 5-10) The court finds that these claims are not frivolous within the meaning of 28 U.S.C. § 1915A(b)(1) and an appropriate order shall be entered.

NOW THEREFORE, at Wilmington this 7th day of January, 2003, IT IS HEREBY ORDERED that:

1. Plaintiff's motion to amend complaint (D.I. 7) is DENIED as moot.

2. Plaintiff's motion for leave to file an amended first complaint (D.I. 8) is GRANTED.

3. Plaintiff's motion for appointment of counsel (D.I. 4) is DENIED.

4. Plaintiff's motion for class certification (D.I. 2) is DENIED.

5. Plaintiff's motion default judgment (D.I. 14) is DENIED.

6. Plaintiff's Fourteenth Amendment due process claims against defendants Kramer, Green, and Rendina are DISMISSED as frivolous pursuant to 28 U.S.C. § 1915A(b)(1).

7. Plaintiff's First Amendment claim against defendants Belanger and Fetzer is DISMISSED as frivolous pursuant to 28 U.S.C. § 1915A(b)(1).

IT IS FURTHER ORDERED that:

1. The clerk of the court shall cause a copy of this order to be mailed to plaintiff.

2. Pursuant to Fed. R. Civ. P. 4(c)(2) and (d)(2), plaintiff shall complete and return to the clerk of the court an **original** "U.S. Marshal-285" form for defendants Holcomb, Fetiz, Gardels, Duan, Powell, Belanger, McGuigan, Cunningham, and Welcome, as well as for the Attorney General of the State of Delaware, pursuant to DEL. CODE ANN. tit. 10 § 3103(c). Failure to submit this form may provide grounds for dismissal of the lawsuit pursuant to Fed. R. Civ. P. 4(m).

3. Upon receipt of the form(s) required by paragraph 2 above, as well as payment in the amount of $405, the United States Marshal shall forthwith serve a copy of the complaint (D.I. 2), the amended complaint (D.I. 6), the motion for leave to file an amended first (D.I. 8), this memorandum order, a "Notice of Lawsuit" form, the filing fee order(s), and a "Return of Waiver" form upon each of the defendants so identified in each 285 form. Plaintiff shall also be required to reimburse the United State Marshal for milage, if such costs are necessary.

4. Within **thirty (30) days** from the date that the "Notice of Lawsuit" and "Return of Waiver" forms are sent, if an executed "Waiver of Service of Summons" form has not been received from a defendant, the United States Marshal shall personally serve said

defendant(s) pursuant to Fed. R. Civ. P. 4(c)(2) and said defendant(s) shall be required to bear the cost related to such service, unless good cause is shown for failure to sign and return the waiver.

5. Pursuant to Fed. R. Civ. P. 4(d)(3), a defendant, who before being served with process timely returns a waiver as requested, is required to answer or otherwise respond to the complaint within **sixty (60) days** from the date on which the complaint, this order, the "Notice of Lawsuit" form, and the "Return of Waiver" form is sent. If a defendant responds by way of a motion, said motion shall be accompanied by a brief or a memorandum of points and authorities and any supporting affidavits.

6. No communication, including pleadings, briefs, statement of position, etc., will be considered by the court in this civil action unless the documents reflect proof of service upon the parties or their counsel. The clerk of the court is instructed not to accept any such document unless accompanied by proof of service.

Sue L. Robinson
UNITED STATES DISTRICT JUDGE